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Chairman: Mr. Politi ..... (Italy)
later: Mr. Vasquez (Vice-Chairman) ..... (Ecuador)

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00-71574 (E)

The meeting was called to order at 10.10 a.m.

Agenda Item 159: Report of the International Law Commission on the work of its fifty-second session (*continued*) (A/55/10)

1. **Mr. Klisović** (Croatia), speaking on unilateral acts of States, said that, although simply transposing the rules of the 1969 Vienna Convention on the Law of Treaties to all categories of unilateral acts would be inappropriate, the invalidity of unilateral acts was one area where the application of the Vienna rules mutatis mutandis was acceptable. The Vienna rules on invalidity of treaties were based on the consensual character of the legal situation created by a treaty and consequently addressed defects in the expression of the true will of the parties (error, fraud, corruption, coercion, threat or use of force in violation of the Charter of the United Nations). Those causes of invalidity of treaties were applicable to unilateral acts as well and were appropriately included in draft article 5.

2. Another important aspect of the validity of unilateral acts had to do with whether a State could dispose of rights and obligations if in so doing it affected the rights or obligations of third States without their consent. Even if there were no defects in the expression of a State's true will, its intention to produce legal effects might fail because that State did not have the right to act unilaterally in a given situation. Such a situation might arise, for example, following the dissolution of a State into several new States. Pending definitive settlement of succession issues, the right to dispose, for instance, of the property and archives of the predecessor State would depend on the mutual agreement of all successor States, and any unilateral act aimed at acquiring or renouncing any right or obligation relating to the succession or claiming continuity from the predecessor State should be regarded as invalid. A provision should therefore be included in the draft articles regarding the incapacity of a State to formulate a unilateral act negatively affecting the rights of third States without their consent.

3. **Mr. Perez Giralda** (Spain), speaking on diplomatic protection, said that the concept had a solid basis in customary international law, and the Commission had sufficient State practice on which to draw in codifying the topic. His delegation shared the view that diplomatic protection in its traditional form, although premised on a fiction, was a useful instrument for the peaceful settlement of disputes between States regarding violations of international law affecting their nationals and served as a valuable complement to the existing fragmented system of human rights protection.

4. His delegation therefore supported the Commission's decision to eliminate article 4 of the draft articles proposed by the Special Rapporteur, which stipulated that the State of nationality of the injured person had a duty, albeit limited, to exercise diplomatic protection on that person's behalf. Diplomatic protection should continue to be conceptualized as a right rather than a duty of the State. Although that right derived from a prior violation by another State of the rights or interests of individuals, the distinction, artificial though it might be, between the right of the State and the right of the individual should be maintained. Even States that had, in their domestic legislation, accorded their nationals the right to diplomatic protection reserved the right to withhold it when the vital interests of the State were involved. Domestic laws providing for compensation to individuals in such cases were not in contradiction with the discretionary nature of the State's right to exercise diplomatic protection at the international level.

5. His delegation also supported the decision to delete draft article 2 as proposed by the Special Rapporteur, which provided for the exceptional use of force as a means of diplomatic protection. Diplomatic protection should be viewed as the initiation of a procedure for the peaceful settlement of a dispute. Article 2, paragraph 4, of the Charter of the United Nations was categorical in rejecting the threat or use of force, and no exceptions should be formulated that might cast doubt on that basic principle of international law.

6. His delegation considered the Special Rapporteur's proposed articles 5 and 7 to be sound. It also viewed with interest the progressive development of law represented by article 8, on the understanding that diplomatic protection of stateless persons and refugees was conceived as being at the discretion of the State and not as the right of the individual, and it supported the clause whereby such protection could not be exercised unless the injury had occurred after the person had obtained legal status in the State of residence.

7. The proposed article 6, on the other hand, lacked justification in State practice. To break with the principle contained in article 4 of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, whereby a State could not afford diplomatic protection to one of its nationals against a State whose nationality such person also possessed, would cause more problems than it would solve.

8. The topic of unilateral acts of States was as important as it was difficult. Some of the difficulties were theoretical, since the concept covered a diversity of acts that could not easily be addressed by a single set of rules. His delegation therefore supported the suggestion that a distinction should be drawn between general rules applicable to all unilateral acts and specific rules applicable to individual categories of unilateral acts.

9. Practical difficulties arose from the need to base the work of the Commission on State practice. State practice on unilateral acts was far from abundant, and in many cases the binding nature of the act was disputed. Moreover, most constitutions were silent on the domestic requirements for unilateral assumption of legal obligations, in contrast to the full regulation given to competence to enter into treaties. The cases mentioned involving forgiveness of debt were exceptional.

10. With regard to the use of the Vienna Convention on the Law of Treaties as a reference for elaborating rules on unilateral acts, his delegation agreed with the flexible approach taken by the Special Rapporteur. Although not all the rules of the Convention were applicable, some were, since treaties and unilateral acts both fell into the category of legal acts.

11. His delegation felt that the definition of a unilateral act was taking shape. The omission of the word "autonomous" should not, however, cause the Committee to lose sight of the need to restrict the scope of the draft articles as much as possible at the current stage and to set aside consideration of silence, acquiescence, estoppel or acts derived from treaties or customary law for the time being. His delegation still had problems with the use of the term "unequivocal" in draft article 1 to qualify "expression of will". It seemed self-evident that any act producing legal effects must be clearly expressed to avoid disputes about interpretation. The key term in the definition of unilateral acts was rather "intention", and, if anything, it was the intention that must be unequivocal. Deletion of the requirement of "publicity" from the definition seemed appropriate, but his delegation preferred an earlier rendering that required that the act should not be simply known but notified or otherwise made known to the State concerned.

12. Draft article 5 constituted a good provisional basis for developing rules about the causes of invalidity, which should be related to the rules defining the conditions of validity of unilateral acts. His delegation shared the interest in seeing a distinction drawn between relative and absolute (or *ex lege*) invalidity. Paragraph 7 of the article should be expanded to make the rule contained in Article 103 of the Charter of the United Nations applicable to unilateral acts, so that obligations under the Charter would prevail over any other obligations, whether assumed by treaty or by unilateral act.

13. **Mr. Leanza** (Italy) said that one of the most controversial points relating to the topic of diplomatic protection was its relationship to human rights protection. It was accepted that a State had the right to ensure that its nationals were treated in accordance with international standards and human rights norms. As a condition for the exercise of diplomatic protection, the individual must have suffered an injury and been unable to obtain satisfaction through local remedies. On the other hand, in the case of gross violations of human rights guaranteed by *erga omnes* norms, other members of the international community were also entitled to act, and that was the justification for paragraph 2 of draft article 1.

14. With regard to draft article 1, paragraph 1, his delegation supported the decision to omit reference to denial of justice, since the issue would involve consideration of primary rules. The question could be revisited in relation to the rule of exhaustion of local remedies. Of the three definitions of diplomatic protection proposed by the Commission, his delegation preferred Option One, which made it clear that the State was exercising its own right rather than the rights of the individual.

15. In draft articles 2 and 4, no clear distinction was made between a State's exercise of diplomatic protection to protect the individual interests of its nationals and its interventions to ensure their survival. Draft article 2 should state explicitly that the use of

force by a State in the protection of its nationals should be limited to highly exceptional circumstances in which their lives were in immediate danger.

16. Draft article 3, like draft article 1, reflected international practice in identifying diplomatic protection as a right of the State and not of the individual — correctly, in his opinion. The system of diplomatic protection and the system of international human rights protection should remain distinct and function side by side, although they might occasionally overlap. The discretionary power of the State to exercise its right was established in customary law and should not in principle preclude the possibility of enacting internal legislation making it an obligation of the State. Since the definition in draft article 1 had already mentioned that the injury to the person must have been caused by an internationally wrongful act, the international nature of the wrongful act was implicit in draft article 3 and did not have to be expressly stated.

17. With respect to draft article 5, international jurisprudence and State practice clearly indicated the importance of determining nationality based on the evidence of an effective or genuine link together with such criteria as birth, descent or bona fide naturalization. His delegation did not think that habitual residence should be adopted as a condition for the exercise of diplomatic protection. His delegation viewed favourably draft articles 6, 7 and 8, even though they reflected tendencies that had not yet acquired the status of customary rules of international law.

18. In approaching the topic of unilateral acts, it was important to avoid analogies with domestic law that might be misleading. The Vienna Convention on the Law of Treaties might be taken as a source of inspiration, bearing in mind that treaties and unilateral acts were two species of the same genus of legal acts, though with different characteristics and rules. His delegation would prefer to see the draft articles divided into two parts, the first devoted to rules common to all unilateral acts and the second addressing the rules applicable to the different categories of unilateral acts. Work on the topic should be limited to unilateral acts of States and should not be extended to other subjects of international law such as international organizations.

19. His delegation welcomed the new definition of unilateral act contained in draft article 1, particularly the replacement of the word "declaration" by the much less ambiguous word "act". The insertion of the phrase "intention of producing legal effects" and the replacement of the assumption of public formulation of the act with the proviso that it must be known to the State or international organization to which it was addressed constituted major improvements. The suggestion that the distinction between unilateral acts which depended on a treaty and unilateral acts in the strict sense should be made in the commentary was a good one, but it was not desirable to delete the adjective "autonomous", which was of fundamental importance in limiting the scope of the draft articles.

20. Article 3, paragraph 1, failed to cover situations in which a unilateral act was formulated by a body of persons, such as parliament, the cabinet or other bodies that might be empowered by internal legislation to do so. On the other hand, the wording of paragraph 2 was appropriate in that it broadened the terms of reference to all State practice.

21. His delegation supported the current wording of article 4 on subsequent confirmation of a unilateral act formulated without authorization, except for the word "expressly", since an act could be confirmed *per concludentiam* when the State did not invoke the lack of authorization as grounds for invalidity.

22. His delegation supported the decision to delete former draft article 6 on the expression of consent, since silence could not be regarded as a unilateral act in the strict sense. The new draft article 5 represented a significant improvement on the treatment of invalidity of unilateral acts, particularly with the addition of conflict with a decision of the Security Council as a cause of invalidity.

23. **Ms. Burnett** (United Kingdom) said, with regard to the topic of diplomatic protection, that it was important for the Commission's work to focus on the practical issues that might arise and to be firmly rooted in State practice. Her delegation shared the view, on which there seemed to be a large measure of agreement within the Commission, that questions of the use of force did not properly form part of the topic. It was therefore right that draft article 2 should be left to one side. In that connection, further attention could usefully be given to clarifying the scope of the draft articles, a matter dealt with in article 1. Her delegation also shared the predominating view that the exercise of diplomatic protection was a discretionary right of the

State. It could therefore not support the proposition in draft article 4, explicitly made *de lege ferenda*, that there should be a "duty" on States, at the level of international law, to exercise diplomatic protection in certain circumstances. Her delegation would, in advance of the Commission's next session, provide written comments on the six specific questions on which the Commission had sought guidance from States.

24. With regard to unilateral acts of States, while welcoming the suggestion that a more focused approach should be taken, she noted that the replies of States to the Commission's questionnaire had been very sparse. Several Governments, including her own, had expressed doubts as to whether the attempt to subject unilateral acts to a single body of rules was well-founded or even helpful. The Commission should give consideration to the future of the whole topic.

25. Pending written comments on reservations to treaties, she doubted whether the results of the work done so far could culminate in a guide of a "practical nature". Such a guide would be welcome, but the proposed guidelines seemed over-elaborate. Several were either redundant or even in danger of adding to the confusion often surrounding the topic. It was, for example, doubtful whether there was a place for "interpretative declarations" or so-called "conditional interpretative declarations" in a practical guide on reservations. The Special Rapporteur's intention to deal with the core issues — the permissibility of reservations and the legal effect of objections, which had been identified from the outset as the two main problems — was welcome.

26. The analysis of some of the most difficult conceptual issues in the Special Rapporteur's report on international liability for injurious consequences arising out of acts not prohibited by international law (prevention of transboundary damage from hazardous activities) was illuminating and helpful. The changes he had recommended were an improvement. Her delegation also endorsed the Commission's decision to shorten the cumbersome title of the topic; the new title should be more focused, reflecting its actual content. It might well be right to omit the reference to "hazardous activities", but the title should not be so truncated that it failed to convey a proper idea of the subject matter. Further thought should be given to finding a succinct way of capturing, in the title, the type of harm or risk concerned.

27. Her delegation would be ready to concur with the Commission's suggestion that the final instrument should take the form of a framework convention, if that met with general acceptance, but in that case it would suggest some modest adaptation of the text to reflect its status. To be meaningful, the instrument should stimulate the conclusion of more specific bilateral or regional agreements and national commitments and should accommodate existing ones. Although it would be unwise to attempt to define all the activities covered by the convention, article 1 could usefully set out a minimum list. It could also provide for States to designate additional activities to be covered, either on a unilateral basis or by agreement with neighbouring States.

28. Her delegation supported the view that the expression "not prohibited by international law" should be deleted from the definition of the scope of the draft convention in article 1, on the basis that the draft convention should apply to any activity involving risk, irrespective of whether it was contrary to any other rule of international law. If such an activity were to contravene other legal obligations, the consequences would follow in the normal way, as draft article 18 showed.

29. It was disappointing that the revised text did not take greater account of the well-recognized principles that precautionary action should be taken, that the polluter should pay and that development should be sustainable. Her delegation hoped that the final draft would reflect those principles explicitly in the text, particularly since they should underlie the process of equitable balancing of interests required by articles 10 and 11. The essence of precautionary action was that in certain circumstances protective measures should be taken in the absence of complete scientific proof of a causal connection between an activity and the harm that was occurring or was anticipated, yet that concept was lacking in draft articles on prevention and prior authorization. The two new articles 16 and 17, on emergency preparedness and notification of an emergency, were useful additions to the draft.

30. **Mr. Guan** Jian (China) said that the topic of diplomatic protection involved a series of complex theoretical and practical questions and had a bearing on inter-State relations. So long as the State remained the dominant actor in international relations, diplomatic protection would, despite the increased efforts by the international community to protect human rights,

continue to be the most important remedy for protecting aliens' rights. In terms of international law, it was a matter of inter-State relations, in that it redressed injuries suffered by nationals of a State as a result of acts committed by another State in violation of international law. A State was entitled to protect the legitimate rights and interests of its nationals abroad, but diplomatic protection was a right belonging to the State, not to its nationals. Whether and how it should be exercised in a specific case fell within the State's discretion. In order to prevent power politics and the abuse of diplomatic protection, therefore, the right to diplomatic protection should be limited. In particular, the use or threat of force in exercising such a right should be prohibited.

31. With regard to the specific issues on which the Commission had asked for comments, his delegation believed that diplomatic protection could be exercised only when the State extending protection could prove that the person concerned was its national. That prerequisite was clear-cut in theory, but in practice its application was complicated by the fact that a person might possess two or more nationalities or be stateless. In the former case, it could be asked which of the States of nationality was entitled to put forward a claim against a third State and whether one State of nationality could put forward a claim against another State of nationality. On the first question, his delegation considered that, in the light of State practice and the relevant provisions of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws, a person having two or more nationalities might be regarded as its national by each of the States of nationality. They were therefore both entitled to claim on his or her behalf against the injuring State and the latter was not entitled to play off one State against the other. With regard to the question whether a State of nationality could put forward a claim against another State of nationality, the answer was in the negative, unless otherwise agreed. As far as stateless persons were concerned, traditionally States could not espouse a claim on their behalf. It might, however, be permissible to do so if the State where the person was a lawful resident was willing to provide diplomatic protection.

32. Because the Commission had concentrated on the draft articles on State responsibility, it had lacked time at its fifty-second session to consider the topic of diplomatic protection, which would in turn affect its plan to complete the first reading before the end of the current quinquennium. His delegation had no objection to giving priority to the draft articles on State responsibility, but hoped that once its second reading was finished, the Commission would give priority to the topic of diplomatic protection, with a view to completing its first reading within two or three years.

33. **Mr. Manongi** (United Republic of Tanzania), referring to the topic of diplomatic protection, said that his delegation endorsed the statement by the representative of South Africa, speaking on behalf of the Southern African Development Community, which had emphasized the need to make it clear that there was no duty on the State of residence to exercise diplomatic protection on behalf of refugees, since that might deter States from providing asylum to refugees or stateless persons. That view should be reinforced. His delegation believed, in common with the Commission, that the question whether a State should be permitted to extend diplomatic protection to a refugee should be treated with caution because of the inherent tension in any effort to broaden the nature and scope of diplomatic protection. The fact that diplomatic protection was a right that only a State could exercise, at its own discretion, should be recognized. The suggestion that it should be available to refugees was based on the international human rights regime, which granted recognition to individuals on the basis of their personhood, rather than their national affiliation. That represented a shift in the criteria applied; eventually the logic of personhood could supersede the logic of nationality as the basis for diplomatic protection. It was doubtful whether that was a desirable outcome.

34. The Special Rapporteur had excluded consideration of the notion that international organizations mandated to protect the welfare of refugees should provide protection, although that option offered an attractive solution to the potential disincentive that draft article 8 currently posed to States hosting large refugee populations. It was a matter of particular concern that the wording of the draft article established habitual residence as a basis for a request for diplomatic protection rather than the traditional criterion of nationality. That could add to the heavy burden already borne by refugee-hosting countries such as his own. It would therefore be preferable to extend the classic "functional" concept whereby international organizations had extended protection to their employees and, in the case of the

United Nations High Commissioner for Refugees, to refugees. The expression "when that person is ordinarily a legal resident", in relation to a stateless person or refugee, in draft article 8 also required clarification. In instances where refugees entered a country as part of an influx and not in an orderly fashion and were then permitted to remain over an extended period of time, the question of the legality of their residence required further elaboration. Lastly, it was apparent from some of the replies by States that there was a potential confusion between diplomatic protection and the law of immunities and privileges. The Commission should clarify the matter in its commentary.

35. **Mr. Rotkirch** (Finland), speaking on behalf of the Nordic countries, said that the topic of unilateral acts of States was challenging, since, in view of the vast array of possible unilateral acts, delimitation of the topic — and the definition of unilateral acts — would be crucial to the success of the undertaking. Of special interest for a codification project were those unilateral acts which produced legal effects in international law. It was, however, doubtful whether the intention of the author State, although highly relevant, should be seen as the sole or fundamental criterion; a unilateral act was binding not only to the extent that such was the intention of the author State but also inasmuch as it created legitimate expectations. The Commission should therefore consider how the principle of good faith should be reflected in the determination of the legal effects of unilateral acts. Although the issue would largely belong to the future Part Two, a reconsideration of draft article 1 might also be necessary. The same applied to some of the questions addressed in former article 6, which had been deleted, such as the effects of acquiescence in some situations and the question of estoppel. The proposed articles 2, 3, 4 and 5 raised no particular problems from the point of view of the delimitation of the topic, dealing as they did with questions that were arguably relevant to all unilateral acts.

36. In response to the Commission's request for suggestions as to the direction of further work, he said that, first, the Nordic countries did not fully agree with the suggested categories of unilateral acts that should be considered, which they found somewhat reductive. The Commission should bear in mind the importance of the context, as well as the interplay between the unilateral act and the legitimate expectations it might create. Secondly, they welcomed the suggestion that the draft should be structured around a distinction between general rules, applicable to all unilateral acts, and specific rules applicable to individual categories of unilateral act. The Commission should also move fairly soon to the specific rules, which might provide a more fruitful starting point for the discussion on the legal effects of unilateral acts than the general rules. Thirdly, there was merit in the suggestion that the study of specific categories of unilateral act should begin by concentrating on those acts which created obligations for the author State, although it was questionable whether that category should be limited to promises.

37. Knowledge of State practice was undoubtedly of great importance for the success of the study, but renewing the appeal to Governments to reply to the questionnaire might not be fruitful. It was evident from the replies received that the formulation of some questions was excessively general, or even obscure, which made it difficult for Governments to reply. Generally, the Commission should guard against an overambitious approach: there was no need for a comprehensive set of rules. A few general rules, together with a study of certain specific situations, could be sufficient. A study to that end could be conducted within a reasonably short time and still make a useful contribution to the understanding of the role of unilateral acts in international law.

38. **Mr. Geete** (India) concurred with those members of the Commission who preferred to deal with the topic of diplomatic protection without any special reference to human rights. While sharing the Special Rapporteur's enthusiasm for the promotion and protection of human rights insofar as their cause could be served through the appropriate use of diplomatic protection, his delegation did not believe it either necessary or desirable to change the very basis of diplomatic protection to serve the broader interests of individual human rights. The Commission's work should be limited to existing precedents and practice. Moreover, a State's action in pursuance of diplomatic protection for its nationals should be limited to representation, negotiation or even judicial proceedings. It should not include reprisals, retortion, severance of diplomatic relations or economic sanctions. The protection of human rights under *erga omnes* obligations was also not a proper part of the topic of diplomatic protection. In such cases, a State's right to intervene was subject to the general law on

State responsibility, which was under separate consideration and in any case was concerned with the broader issue of ensuring respect for obligations owed to the entire international community. It was a different matter altogether and should not be confused with the topic of diplomatic protection.

39. Diplomatic protection was also fundamentally incompatible with the right to use force in defence of rights of nationals. The two concepts could not coexist and could not even be integrated. Force was generally used as a last resort and even then its use would need to be judged against the general prohibition contained in Article 2, paragraph 4, of the Charter of the United Nations. Its inclusion in articles on diplomatic protection would raise complicated questions and was better avoided. His delegation supported the Commission's decision to delete draft article 2 on the question originally proposed by the Special Rapporteur.

40. With regard to the question addressed in draft article 3, his delegation shared the view that, although the right of diplomatic protection belonged essentially to the State, to be exercised at its discretion, it should serve the interests of nationals as far as possible. Concern for the rights of the individual should not, however, be stretched to the point where it was obligatory for the State of nationality to espouse the claim in question despite political or other sensitivities. The Commission's decision not to include draft article 4, on the mandatory obligation of the State of nationality, was therefore welcome. The cross-reference to the concept in draft article 3 would presumably also be deleted.

41. With regard to draft article 5, his delegation agreed that the State's right to espouse the claims of its national should not be open to question, as long as the nationality granted had the proper basis, such as birth, descent or naturalization.

42. With regard to draft article 6, his delegation believed that as long as the individual concerned had suffered injury within the territory of the State of which he or she was a national, there was no scope for the exercise of diplomatic protection by any State, including the State of dominant or effective nationality. Any problems suffered by individuals in that regard were the natural consequences of the benefits which they would otherwise enjoy from holding dual or multiple nationality.

43. As to draft article 7, while there was no objection in principle to multiple sponsorship of a diplomatic claim irrespective of the principle of dominant or effective nationality, his delegation believed that it was necessary to guard against excessive international pressure being put on a State on account of injury suffered by a foreign national within its territory.

44. Draft article 8 was controversial. Neither the 1951 Convention relating to the Status of Refugees nor the 1961 Convention on the Reduction of Statelessness required the State providing refuge to exercise protection on behalf of stateless persons and refugees. It was difficult to envisage the circumstances under which such protection must be exercised. Surely it could not be exercised against the State of nationality. In respect of the exercise of such protection against a third State, the continued treatment of the individual as a refugee in the territory in which the injury was suffered would presumably prevent the State of habitual residence from taking up the claims involved. It might be useful to compile data concerning actual situations in which refugees would require diplomatic protection from such States over and above the functions of the United Nations High Commissioner for Refugees.

45. Turning to the topic of unilateral acts of States, he said that the legal effects of unilateral acts as a source of international law was an eminently fit subject for study. The important question was whether any uniform or common features could be identified from the different types of unilateral acts that occurred from time to time in State practice. The conclusions drawn by the Special Rapporteur so far were based on the survey of the existing literature. However, as that was not sufficient to clear many of the remaining doubts, the Commission had chosen to seek information from Governments through a questionnaire. It was necessary to wait for their responses before the available evidence on State practice could be assessed properly.

46. It was also necessary to see how many States would allow international obligations to be incurred on the basis of oral unilateral acts, including silence, as opposed to acquiescence, or by way of estoppel, which involved a certain type of conduct. The Special Rapporteur himself had identified acquiescence and estoppel as outside the scope of his study. The Indian delegation supported the position taken by the Special Rapporteur that the provisions of the Vienna Convention on the Law of Treaties and its *travaux*

préparatoires could provide guidance in formulating the legal regime governing unilateral acts.

47. **Mr. Longva** (Norway), speaking on behalf of the Nordic countries, endorsed the Commission's view that the topic of diplomatic protection was ripe for codification and had great practical significance. In the view of the Nordic countries, it was important to focus on practical needs rather than theoretical debates. A desirable outcome would be a guide to practice.

48. The question of the use of force in the context of diplomatic protection was highly controversial. In the view of the Nordic countries, that question was not part of the topic of diplomatic protection. Any rule permitting or justifying the use of force in that context could easily prove dangerous. States should not be given a legal basis to use force other than in self-defence, as provided for in Article 51 of the Charter of the United Nations. The countries on whose behalf he spoke noted with satisfaction that draft article 2 had not won acceptance by the Commission.

49. Diplomatic protection was a sovereign prerogative of the State of nationality of the person concerned, who for all practical purposes, was to be considered as a beneficiary of international law. There was no obligation on the part of the State to present a claim on behalf of an injured national. The Nordic countries therefore welcomed the Commission's decision not to refer draft article 4 to the Drafting Committee.

50. Diplomatic protection was not recognized as a human right and could not be enforced as such. The Nordic countries shared the view that a distinction must be made between human rights and diplomatic protection, since, if the two were confused, more problems might be raised than solved. Any State had the right to act and might even have a duty to act when faced with human rights violations, whether the persons affected were its own nationals, nationals of the wrongdoing State or nationals of a third State. However, diplomatic protection should not serve as the instrument for such action because it was not the rights and interests of nationals alone that were to be defended, but those of the international community as a whole.

51. **Mr. Kocetkov** (Bosnia and Herzegovina), referring to the topic of diplomatic protection, said that his delegation supported the deletion of draft article 2 concerning the threat or use of force in the exercise of diplomatic protection. It was clear that the use of force was not part of the topic of diplomatic protection and that its introduction would be unacceptable.

52. His delegation also supported the deletion of draft article 4. The proposal that the State of nationality had a legal duty to exercise diplomatic protection on behalf of an injured person upon request was not in conformity with customary international law, in accordance with which diplomatic protection was a discretionary right of the State and not of the individual.

53. With regard to draft article 5, his delegation believed that while diplomatic protection was closely linked to nationality, the issue of the acquisition of nationality did not fall within the scope of the topic.

54. His delegation was interested in dual or multiple nationality, which was a fact of international life, even if not all States recognized it. The 1997 European Convention on Nationality accepted multiple nationality on condition that the provisions relating to multiple nationality did not affect the rules of international law concerning diplomatic or consular protection by a State party in favour of one of its nationals who simultaneously possessed another nationality. Bearing in mind the consequences of mass migrations, the process of globalization and trends in the implementation of the policy of "open borders", the position of persons with dual or multiple nationality should be further elaborated in respect of diplomatic protection. It would be desirable to have a more precise definition of the distinction between an effective link and a weak link between a national and his/her State.

55. **Mr. Czaplinski** (Poland), referring to the topic of diplomatic protection, said, with regard to draft article 1, that Option One, proposed for consideration by the Drafting Committee on the basis of the Informal Consultations, appeared to be the best way of reflecting existing State practice. The replacement of the word "action" in paragraph 1, as suggested by the Special Rapporteur, by a more descriptive formula, such as "diplomatic action" or "judicial proceedings", also appeared to be justified. It was worth recalling that the Permanent Court of International Justice, in the *Mavrommatis Palestine Concessions* case, had stated that the proper way for a State to exercise diplomatic protection was by resorting to diplomatic action or international judicial proceedings.

56. Bearing in mind that the prohibition against the threat or use of force, as proclaimed in Article 2, paragraph 4, of the Charter of the United Nations, was one of the most important norms of contemporary international law, his delegation supported the Commission's rejection of the initial proposal by the Special Rapporteur in draft article 2 to recognize the possibility of resort to the threat or use of force as a means of diplomatic protection. The threat or use of force in the exercise of diplomatic protection could not be justified even if it could be characterized as self-defence. At the current stage of development of international law, the question of the use of force was not part of the topic of diplomatic protection and lay outside the Commission's mandate.

57. While recognizing the right of each State of nationality, as proclaimed by draft article 3, to exercise diplomatic protection on behalf of a national or even, in exceptional circumstances, of a non-national, unlawfully injured by another State, his delegation believed that that right should be treated as discretionary and not connected with an obligation to exercise it on the request of an injured national. Consequently, his delegation saw no reason for the retention of draft article 4, providing for such an obligation if the injury resulted from a grave breach of a *jus cogens* norm. Such a suggestion was in fact *de lege ferenda* and not based on the general practice of States.

58. With regard to draft articles 5 to 8, the Commission had formulated a series of questions to be answered by Governments. The first question was whether a State could exercise diplomatic protection on behalf of a national who had acquired nationality by birth, descent or bona fide naturalization where there was no effective link between the national and the State. His delegation believed that that question should generally be answered in the affirmative, especially where such a person did not simultaneously possess any other nationality. In such a case, any attempt to deprive the person of the possibility of enjoying the diplomatic protection of his/her State of nationality would be unjustified and would put that person in the position of statelessness. Except in the exceptional circumstances provided for in draft article 8, in no case should a link of habitual residence replace a link of nationality as a necessary connection between an injured person and a State entitled to exercise diplomatic protection on behalf of that person, especially when the nationality was obtained on the basis of birth, descent or bona fide naturalization. The problem became more complex, however, in situations of multiple nationality, as reflected in the Commission's questions (c) and (d) and in draft articles 6 and 7. The order of those two draft articles should be reversed, since draft article 7 contained a more general rule, while draft article 6 dealt with a specific situation of one State of nationality exercising diplomatic protection against another State of nationality of the same person.

59. With regard to the Commission's question (c), it seemed obvious that a State with which the national had an effective link could exercise diplomatic protection when that national was also a national of another State with which he or she had a weak link. No problems should be created by the exercise of such protection vis-à-vis any third State. There might, however, be some difficulties when diplomatic protection was exercised against another State of nationality. It should be recalled that article 4 of the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws provided that a State could not afford diplomatic protection to one of its nationals against a State whose nationality such person also possessed.

60. While the Special Rapporteur had cited many examples, mainly judicial decisions, in which the development and application of the principle of effective or dominant nationality in cases of multiple nationality had taken place, it appeared premature to state that the principle embodied in draft article 6 reflected the current position in customary international law which accorded legal protection to individuals even against the State of which they were nationals.

61. With regard to draft article 6, it should be stressed that the principle of effective or dominant nationality in cases of dual nationality might be applicable where diplomatic protection was exercised by one of the States of nationality against a third State. However, where it was applied to the exercise of diplomatic protection by one State of nationality against another such State, it appeared that there was still a lack of sufficient support in customary international law for such codification. Accordingly, his delegation believed that the Commission's question (d) should be answered in the affirmative, although it understood that on the basis of draft article 7 there might be competition with

another State of nationality wishing to exercise diplomatic protection.

62. His delegation answered the Commission's questions (e) and (f) in the affirmative. It supported draft article 8 concerning the exercise of diplomatic protection vis-à-vis stateless persons and refugees.

63. *Mr. Vasquez (Ecuador), Vice-Chairman, took the Chair.*

64. **Mr. Hilger** (Germany) said that article 2 of the draft articles on diplomatic protection touched upon a highly sensitive area. His country condemned any use of force in international politics. Exceptions could be permitted only on legitimate grounds recognized by international law. Diplomatic protection should be regarded as a procedure for the peaceful settlement of disputes between States, and therefore could not, in principle, serve as a legitimate ground for the use of force. Without ruling out any use of force in the context of diplomatic protection, he doubted whether a discussion of the use of force was warranted in that context.

65. Draft article 4 envisaged diplomatic protection as a right which the individual could invoke against his or her State. His country took the view that it was for States to decide whether to exercise diplomatic protection, and accordingly it was their right to provide it. The question whether a State should provide it was a matter of internal, not international law. Moreover, if it decided not to do so there was no violation of human rights. The attempt in draft article 4 to protect human rights was unnecessary. Human rights had not yet developed sufficiently in international law, through *opinio juris* and State practice, to warrant codification of an individual right to diplomatic protection.

66. Draft articles 5, 6 and 7 dealt with the problem of determining the effective or dominant nationality of individuals possessing dual or multiple nationality. He agreed in principle with the solutions adopted in those articles, especially the extension and development of the principle of effective or dominant nationality. However, an effective link with the claimant State must not become a condition for diplomatic protection, especially where an individual possessed only one nationality. Otherwise, such an individual would be deprived of the protection and be reduced to the level of a stateless person.

67. Turning to the topic of unilateral acts of States, he drew attention to Germany's reply to the Commission's questionnaire on the topic. In view of the great diversity of unilateral acts in State practice, he doubted whether the topic was suitable for codification. His delegation intended to comment on the discussion on the item following the Commission's next session.

68. **Mr. Rogachev** (Russian Federation) said that diplomatic protection was one of the oldest institutions in international law, and still among the most controversial. The difficulty for the Special Rapporteur, and for the Commission, in dealing with the topic was how to strike a proper balance between the codification of the general rules of international law in that area, and its progressive development in accordance with current trends. In formulating the draft articles, his delegation would recommend a conservative approach, to reflect the line taken by Governments. His own delegation took the view that diplomatic protection was extended only to nationals, and only through diplomatic or consular channels. The concept of diplomatic protection had to be correctly defined. Its scope was unduly restricted by the term "internationally wrongful act" used in draft article 1 for an act of a State giving rise to a right to diplomatic protection. It would be better to use the term "unlawful", as in draft article 3. The definition of diplomatic protection in draft article 1 should make clear that the protection in question comprised only the kind of protection offered by diplomatic and consular agents for the rights of nationals of the claimant State, which of itself meant that force could not be used. As for the beneficiaries of the protection, many modern constitutions, including that of the Russian Federation, gave parity to stateless persons along with nationals. However, their new status had not yet been reflected in international law. State practice was still based on the old rule that individuals without a nationality had no right to diplomatic protection because an injury done to them was not an injury to any State. That could not be regarded as an acceptable position in modern society, but nor should the issue be dealt with in the framework of diplomatic protection, which bore solely upon the legal relationships deriving from nationality. The absence in the draft articles of substantive provisions on protection for individuals who were not nationals did not mean that they could not enjoy the protection of their State of residence. He therefore supported the formulation of draft article 8, although, as the

Chairman of the Commission had pointed out, it placed an additional burden on States which took in refugees. Another difficulty lay in the traditional doctrine and practice of States, which was to treat the right to diplomatic protection as a right of States, whereas some modern constitutions attributed it to individuals.

69. Draft article 3 treated the right of the State to exercise diplomatic protection as a discretionary right. That was not really the case, since a State could not choose arbitrarily to exercise it on behalf of some nationals rather than others; it must protect all equally, and must also observe the fundamental principles of international law when deciding how to exercise it. Draft article 4, which was intended to clarify the obligation of a State to provide diplomatic protection, had actually confused the situation further by confining the obligation to grave breaches of norms of *jus cogens*. Such breaches gave rise to State responsibility, not to a duty to provide diplomatic protection, so paragraph 2 of draft article 4 became meaningless.

70. Draft article 5 paid too much attention to issues of nationality. He would prefer to reword it simply to read: "For the purposes of diplomatic protection of natural persons, the 'State of nationality' means the State whose nationality the individual claiming diplomatic protection lawfully possesses".

71. Although the codification of the rules on diplomatic protection was in the initial stages and thus inevitably brought up a number of controversial issues, it was a thoroughly practical and worthwhile project.

72. **Mr. Choung** Il Chee (Republic of Korea), dealing first with the topic of State responsibility, said that on the whole, he could accept the formulation of draft article 22, which precluded the international wrongfulness of an act of a State if it constituted a lawful measure of self-defence taken in conformity with the Charter of the United Nations. However, Article 51 of the Charter required there to be an armed attack on the State before it could exercise the right of self-defence. It was not entirely clear whether the inherent right of self-defence could be exercised before an attack took place. As his delegation had previously suggested, the wording of draft article 22 could be changed to reflect the possibility of a State invoking its right of self-defence under customary international law, bearing in mind the declaration of the International Court of Justice, in the case between Nicaragua and the United States of America, that customary international law "continues to exist alongside treaty law".

73. Draft article 37, paragraph 2, required the compensation to "cover any financially assessable damage including loss of profits" but without including moral damage, although the earlier draft article 44 had made provision for "economically assessable damage" which according to the commentary included moral damage. If the new term "financially assessable damage" was intended to cover moral damage, that should be made clear in the text of draft article 37. To exclude moral damage would be inconsistent with international arbitral jurisprudence, which had established in the 1926 *Janes* case that claims for loss or damage "are sufficiently broad to cover not only reparation (compensation) for material losses in the narrow sense, but also satisfaction for damages ... of indignity, grief and similar wrong".

74. He welcomed the inclusion in draft article 41 of obligations *erga omnes*, now set down in codified form. However, the wording of draft article 41 raised a number of questions, especially the nature of the "fundamental interests" of a State, the definition of a "gross or systematic failure", and the standard implied by the phrase "risking substantial harm". Similarly, in draft article 46, he wondered what kind of conduct by an injured State constituted valid acquiescence, and what time-frame was required for its claim to lapse. Draft article 49, paragraph 1 (a), referred to "the protection of a collective interest". The interest of a group of States might clash with the interests of the international community as a whole. The possibility of such a conflict should be avoided.

75. Draft article 53 involved an issue of fairness. The burden of calling upon the other State and offering to negotiate with it should be shifted from the injured to the injuring State.

76. Turning to the draft articles on diplomatic protection, he suggested inserting the words "short of use of force" in draft article 1, paragraph 1, after "diplomatic protection means action". The concept of diplomatic protection should not include the use of force as a method of settling international disputes. When a State used force to protect its nationals abroad, the grounds invoked were usually self-defence, self-help or "humanitarian intervention". However, the threat or use of force was no longer permissible, according to Articles 1 and 2 of the Charter of the

United Nations, its preamble and other relevant United Nations instruments. As it stood, draft article 2 might be invoked by strong Powers to impose their will on small or weak States. He therefore endorsed the observation of the Special Rapporteur that draft article 2 was not acceptable to the Commission. However, he supported the traditional approach adopted in draft article 3, whereby States had a discretionary right to exercise diplomatic protection on behalf of their nationals.

77. Draft article 4, paragraph 1, raised two issues: first, it provided that a State had a "legal duty", rather than a discretionary right, to extend diplomatic protection to its nationals abroad; and, second, it referred to *jus cogens*, which had not been clearly defined under international law. He therefore agreed that there was a need for more State practice and *opinio juris* before the issue could be considered by the Commission.

78. He was in favour of retaining reference to birth, descent or bona fide naturalization in draft article 5; whatever its merits, the decision of the International Court of Justice in the *Nottebohm* case had not abolished the traditional criteria for the determination of nationality.

79. In draft article 6, it would be preferable to employ the more widely-used term, "effective nationality". Furthermore, the draft article allowed States to extend diplomatic protection to persons with dual nationality; however, the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws established that a State could not afford diplomatic protection to one of its nationals against a State whose nationality such person also possessed. In any case, the Republic of Korea would not be affected by that provision since dual nationality was not permitted under its legislation.

80. With respect to draft article 8, he noted that a person who had become a legal resident could no longer be considered a refugee and could therefore claim diplomatic protection from the host State; if habitual residence was included among the criteria for nationality, habitual residents of the host State would also be eligible for diplomatic protection. However, it might be useful to add a statement that the United Nations High Commissioner for Refugees was authorized to protect stateless persons and refugees who lacked such social links. He also agreed with the suggestion that draft article 8 should be divided into two parts dealing with stateless persons and refugees, respectively.

81. Turning to the draft articles on unilateral acts of States, he suggested that the word "concerned" should be deleted from draft article 3, paragraph 2, in order to broaden the scope of that provision. Furthermore, the closely-related concepts of silence and acquiescence should have been grouped together; in both cases, where no act was involved, the absence of a reasonably expected protest constituted acceptance of a unilateral act. The Commission should also consider the doctrine of estoppel, which had become a part of international case law.

82. Draft article 5, paragraph 7, was consistent with Article 25 of the Charter of the United Nations, under which Members of the United Nations agreed in advance to carry out the decisions of the Security Council. However, he did not understand the purpose of paragraph 8, since States would not normally formulate unilateral acts that conflicted with a norm of fundamental importance to their domestic law, which he took to mean their Constitution; the issues raised by such incomprehensible behaviour should be resolved at the domestic level. The paragraph should therefore be reworded or deleted.

83. **Mr. Al-Baharna** (Bahrain) said he hoped that the Commission would complete its consideration of State responsibility by the end of the current quinquennium. To that end, the questions relating to responsibility for breaches of *ergo omnes* obligations and to original article 19 should be resolved and the question of countermeasures reconsidered in light of the views expressed by Governments. Furthermore, a compulsory dispute settlement regime would be necessary if, as he hoped, the draft articles were to be adopted as a convention.

84. Although Part Two and Part Two bis were closely related in subject matter, it would be preferable either to rename the latter Part Three or to divide Part Two into two sections on content and implementation, respectively.

85. He endorsed the decision to reformulate the draft articles from the perspective of the State incurring responsibility and to group all the general provisions together in Part Four and agreed with the suggestion that the draft articles should be expanded to cover all *cases of State responsibility. He particularly welcomed*

the revised provisions of Part Two, Chapter III; draft article 41 should provide an acceptable compromise that would put an end to the long-standing conflict on original article 19. However, in the interests of clarity, the words "of the international community as a whole" should be inserted after "interests" in draft article 41, paragraph 2.

86. Although draft article 42 made stronger provision for the consequences of serious breaches than had draft articles 51 and 53 of the version adopted on first reading, it failed to provide for satisfactory damages or reparation arising from aggression or genocide. It would be preferable to include a reference to Chapter VII of the Charter of the United Nations and to amend paragraph 3 to read: "This article is without prejudice to the consequences referred to in Chapter II of this Part and to such further consequences that the serious breaches may entail under international law".

87. Chapters I and II of Part Two bis represented a great improvement on the previous version; however, he suggested that several minor drafting changes should be made to draft article 43. He also expressed concern that the reference to provisional countermeasures in article 53, paragraph 3, might lead to abuse and proposed that the paragraph should be deleted.

88. Lastly, he suggested that the words "and principles" should be added after "rules" in draft article 56.

The meeting rose at 1 p.m.